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Supreme Court, U.S.
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No. 99-574

IN THE
Supreme Court of the United States

THOMAS RIDGE, GOVERNOR OF THE COMMONWEALTH OF PENNSYLVANIA, et al.,
Petitioners,

v.

DAVID POWELL, et al.,
Respondents.

Petition for Writ of Certiorari to the
United States Court of Appeals
for the Third Circuit

REPLY OF PETITIONERS IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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REPLY OF PETITIONERS IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Unable to identify any legitimate reasons why this Court should refuse to hear the important federal questions raised in the Petition, Respondents ignore the case they pleaded in the courts below and re-write the Complaint in a vain effort to convince this Court that discriminatory effect regulations are not implicated here. Petitioners respectfully submit this Reply Brief in support of their Petition, and assert four additional reasons why *certiorari* is warranted. First, Respondents have never advanced a theory of intentional discrimination in the Complaint or in the Courts below and cannot do so here to escape review of Title VI "discriminatory effect" regulations. Second, Respondents' argument that their Section 1983 claim does not make this an appropriate case to review discriminatory effect regulations fails because Respondents' Section 1983 claim is based exclusively on Petitioners' alleged violation of the challenged discriminatory effect regulation. Moreover, like the Title VI regulation claim, the relief sought under Section 1983 calls for the district court to impermissibly re-write complex state public school funding legislature based entirely on "generally-worded regulations." Third, although Respondents argue the absence of a split of authority among the circuit courts of appeal requires this Court to deny *certiorari*, there was no circuit split at the time this Court granted *certiorari* on one of the issues presented here in *Seif v. Chester Residents Concerned for Quality Living*. Fourth, Respondents fail to address Petitioners' argument that Respondents' proposed interpretation and application of the generally-worded discriminatory effect regulation violates basic principles of federalism.

I. Respondents Mischaracterize The Complaint In Order To Avoid Review Of The Proper Scope And Enforcement Of Title VI Discriminatory Effect Regulations

The issues of whether a discriminatory effect regulation is valid, and whether a private right of action exists under such a regulation, are fundamental to this case. In an effort to avoid

review of the scope and enforcement of the single discriminatory effect regulation on which their claims are based, Respondents attempt to characterize the Complaint as stating claims for intentional discrimination. These new characterizations advance an entirely different theory of the case than what was presented in the written and oral submissions to both courts below. Indeed, Respondents began their Complaint by alleging "***that Defendants have discriminated in effect....***" Complaint at ¶1 (Appendix "H" to Petition in *Ridge v. Powell* at 201a) (emphasis added). Moreover, Count I of the Complaint did not purport to state a claim directly under Title VI but rather was itself entitled "Racial and National Origin Discrimination by ***Differential and Disparate Treatment Under Title VI Implementing Regulations.***" (Appendix "H" at 221a) (emphasis added). In support of that Count, Respondents alleged that:

> 73. The Commonwealth Defendants' funding policies and practices wrongfully discriminate...by utilizing criteria and methods that have had the foreseeable ***effect*** of subjecting such students to discrimination...in violation of the Title VI implementing regulations applicable to federal education programs...."
>
> * * *
>
> 75. The Commonwealth defendants' funding policies and practices have had the foreseeable, ***racially discriminatory effect*** of further isolating the Student Plaintiffs...."

Appendix "H" at 223a (emphasis added).

On appeal to the Third Circuit, Respondents continued to argue that their case was based on a discriminatory effect regulation, not Section 601 of the Civil Rights Act. Indeed, Respondents argued throughout their appellate brief that they were only proceeding under the discriminatory effect regulation. Supplemental Appendix "A" at 3a ("the Commonwealth's 'criteria [and] methods' of funding public education

yield racially different results. . . . The Complaint sets forth several sets of comparisons that demonstrate this adverse racial ***impact*** with respect to Commonwealth treasury revenues") (emphasis added); *id.* at 4a ("Plaintiffs pleaded racially discriminatory adverse ***impact*** with respect to total revenue as well") (emphasis added); and *id.* at 5a-6a (under the heading of "Causes of Action," stating that "All plaintiffs joined Count One which alleges racial and national origin discrimination by disparate treatment that has ***an adverse racial impact, contrary to the DOE regulations*** implementing Title VI of the Civil Rights Act of 1964") (emphasis added).

At oral argument, counsel for Respondents disclaimed any suggestion that a violation of the regulation stated a claim under the statute:

> THE COURT: I just want to understand your argument. If I understand your argument on intent, it is that because the regulation speaks in terms of impact and the regulation is promulgated under Title VI therefore, if you show a violation of the regulation or a disparate impact under the regulation, you have met the intentional requirement of Title VI?
>
> MS. BRANNAN: No, Your Honor. We surely have met the requirement of the regulation.

Transcript at 21 (Supplemental Appendix "B"). Moreover, even in this Court Respondents candidly admit that "Count I of the Complaint claims that [the Commonwealth's] funding policies and practices violate the Department of Education Title VI regulation . . .," *not* Section 601 of the Civil Rights Act. Brief in Opposition at 5. In addition to their improper attempt to characterize the Complaint as one for intentional discrimination, Respondents attempt to escape the "discriminatory effect" language of the challenged regulation by claiming it prohibits other types of conduct. Brief in Opposition at 5-6. Regardless of which subsection of the regulation is applied, the fundamental premise of the Complaint is that the

Commonwealth's education funding system discriminates in effect, or yields different results.[1] *See id.* More importantly, there is no allegation of intentional discrimination here in violation of the statute.

This Court should reject Respondents' last-minute efforts to mischaracterize the nature of the claims. Both of the claims in this case are based exclusively on a *single* federal regulation that prohibits discrimination in effect. The issues of whether such a regulation is valid and whether a private right of action exists under such a regulation are important federal questions that are at the heart of this case.

II. The Section 1983 Claim Does Not Provide An Independent Basis For Respondents' Claims

Respondents' efforts to persuade this Court to deny review based on the existence of a Section 1983 claim should be rejected for two reasons. First, Respondents' Section 1983 claim is based exclusively on Petitioners' alleged violation of a discriminatory effect regulation. If there is no cause of action based on Title VI discriminatory effect regulations, as Petitioners contend, then Respondents' Section 1983 claim must be dismissed as well. Second, whether Respondents base their claim on a Title VI regulation or Section 1983, this Court's direction not to re-write complex state legislative schemes based on "generally-worded regulations" as set forth in *Alexander v. Choate* applies equally to both claims.

A. The Section 1983 Claim Is Based Exclusively On Violations Of Discriminatory Effect Regulations

Although Respondents complain that Petitioners paid little attention to their Section 1983 claim, the Section 1983 claim is based exclusively on the challenged discriminatory effect regulation. Indeed, in Respondents' two-count Complaint, Count II, which purports to state a claim under Section 1983, explicitly so states:

---

1. Thus, Respondents' argument that this Court might not have to review the "discriminatory effect" portion of the regulation if they prevailed on another portion of the regulation makes no sense.

> 82. The rights secured by Title VI, 42 U.S.C. §§ 2000d through 2000d-4a, and the regulations implementing Title VI for education programs or activities receiving federal financial assistance, 34 C.F.R. Part 100, are rights, privileges or immunities secured by the laws within the meaning of 42 U.S.C. § 1983.
>
> 83. The Commonwealth Defendants' funding policies and practices, by discriminating against African-American, Hispanic, Asian and other minority students in the school district, harm the educational opportunities of the Student Plaintiffs *in violation of the Title VI implementing regulations as alleged in Count I above....*"

Appendix "H" at 226a (emphasis added). Moreover, respondents confirmed for this Court the fact that their Section 1983 claim was based solely on the challenged regulation, stating in their Brief in Opposition that if "Pennsylvania officials . . . violate[ ] their obligations under the Title VI regulation, [then they] are liable . . . under § 1983." Brief in Opposition at 7. Respondents, consistent with their arguments to the courts below, offered this Court no other basis for their Section 1983 claim. Thus, the Section 1983 claim is based on the same claim for discrimination in effect under the Title VI implementing regulations. The presence of such a claim adds nothing to the analysis of whether review is appropriate.

B. *Alexander v. Choate's* Prohibitions Against Using "Generally-Worded Regulations" To Re-Write Complex State Funding Legislation Apply Equally To Section 1983 Claims

The Petition for a Writ of Certiorari argued, based on this Court's reasoning in *Alexander v. Choate*, that the generally-worded regulation upon which Respondents rely in support of their Title VI claim cannot, consistent with federalism concerns, be used to re-write complex state funding legislation. Respondents gloss over this argument (*see* Section IV below), but the argument applies equally to Section 1983 claims, par-

ticularly where, as here, Respondents seek the exact same relief under both claims. *See* Appendix "H" at 226a-227a (asserting a single claim for relief under both Counts). In short, the presence or absence of a Section 1983 claim under the facts of this case is irrelevant and does not impact the sound reasons for granting *certiorari*.

III. The Absence Of A Circuit Split On The Issue Of Title VI Regulations Is Immaterial

The Petition for a Writ of Certiorari asks this Court to decide whether discriminatory effect regulations are valid and support a private cause of action because these questions are important federal questions that should be decided by this Court, and because the Third Circuit decided the questions in a way that conflicts with other decisions of this Court. These are valid bases for review. Supreme Court Rule 10.

The absence of any split of authority in the circuit courts is immaterial. As argued in the Petition, this Court previously granted *certiorari* on a nearly identical issue in *Chester Residents*, despite the fact that there was no such split of authority. Because this Court vacated the judgment in that case there still remains "an important question of federal law that has not been, but should be, settled by this Court." Supreme Court Rule 10. Moreover, despite the purported unanimity of the courts of appeal, those federal courts, as Petitioners contend, "decided an important federal question in a way that conflicts with relevant decisions of this Court." *Id.* Accordingly, review of these questions is entirely appropriate.

IV. Respondents Ignore Petitioners' Federalism Argument

Respondents do not address Petitioners' federalism argument. The issue is not whether "public school education [is within] the reach of the federal civil rights laws based on race." Brief in Opposition at 26. The issue is whether Congress, in authorizing federal agencies to promulgate regulations under Title VI, "clear[ly] and manifest[ly]" intended to "pre-empt the historic powers of the States" to devise legislative schemes to fund public schools. *Gregory v. Ashcroft,* 501 U.S. 452, 461 (1991); *see also Rodriguez v. San Antonio Inde-*

pendent School District, 411 U.S. 1, 40, 41 (1973) (holding public school funding is an area in which this Court has traditionally deferred to legislatures). Petitioners argued that the generally-worded regulation that Respondents rely on here did not evidence such an intent. Moreover, Petitioners pointed out the inherent dangers of the interpretation advanced by Respondents, noting that ultimately a local government entity may be able to use federal regulation "not only to attack the allocation of state monies, but also to attempt to dismantle the [legislatively mandated] system of local control over school funding." Petition at 27.

Respondents failed to address these fundamental points. Citing no cases to support their position, Respondents instead attempt to distinguish *Alexander v. Choate* on the grounds that it did not involve "racial discrimination." Brief in Opposition at 26. This distinction is irrelevant. This Court specifically held that Section 504 of the Rehabilitation Act of 1973, which was before the Court in *Alexander*, was modeled in part on Title VI. Moreover, Respondents made no effort whatsoever to distinguish the wording of the regulation at issue in *Alexander* from the wording of the regulation at issue in this case, realizing that there is no material difference between the regulations, and the logic of *Alexander* applies with equal force here.

Finally, Respondents argue in a footnote that their case does not involve an attempt to obtain additional funding based on factors external to the state's subsidy program; rather, they claim their case involves a "straightforward claim of racial discrimination inherent in the funding formula itself." Brief in Opposition at 26, n.13. Regardless of the characterization of the claim, Respondents still intend to ask the district court to give them more money.

CONCLUSION

For the reasons set forth in their Petition for a Writ of Certiorari, and in this Reply, Petitioners respectfully request that this Court grant the Petition.

Respectfully submitted,

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APPENDIX

APPENDIX A
CITED EXCERPTS FROM BRIEF OF APPELLANTS

IN THE

United States Court of Appeals for The Third Circuit

Nos. 98-2096, 98-2157

DAVID POWELL; SHELEAN PARKS; PATRICE EVERAGE; JULIA A. DAVIS; YVETTE BLAND; GERALDINE NEWTON; MARIA M. RIVERA; MARY E. MILLER; GREGORY LUZAK; CATHERINE LUZAK; FU-ZHEN XIE; THE BLACK CLERGY OF PHILADELPHIA AND VICINITY; PHILADELPHIA BRANCH NAACP; ASPIRA, INC. OF PENNSYLVANIA; PARENTS UNION FOR PUBLIC SCHOOLS; CITIZENS COMMITTEE ON PUBLIC EDUCATION IN PHILADELPHIA; PARENTS UNITED FOR BETTER SCHOOLS; DAVID W. HORNBECK, Superintendent, The School District of Philadelphia; FLOYD W. ALSTON, President, Board of Education of the School District of Philadelphia; BOARD OF EDUCATION OF THE SCHOOL DISTRICT OF PHILADELPHIA; THE SCHOOL DISTRICT OF PHILADELPHIA; EDWARD G. RENDELL, Mayor, City of Philadelphia; CITY OF PHILADELPHIA,

Appellants,

PHILADELPHIA FEDERATION OF TEACHERS LOCAL 3; TED KIRSCH, President, Guardian ad Litem,

Appellants (Intervenors in District Court),

v.

THOMAS J. RIDGE, Governor of the Commonwealth of Pennsylvania; DR. JAMES P. GALLAGHER, Chairperson, Commonwealth of Pennsylvania State Board of Education; DR. EUGENE W. HICKOK, Secretary of Education; BARBARA HAFER, Treasurer,

Appellees,

MATTHEW J. RYAN; ROBERT C. JUBERLIRER; JESS M. STAIRS; JAMES J. RHOADES,

Appellees (Intervenors in District Court).

Appeal from the Final Judgment of the United States District Court for the Eastern District of Pennsylvania

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Commonwealth legislative and gubernatorial action. *See Shapp v. Sloan*, 480 Pa. 449, 391 A.2d 595 (1978).

The Commonwealth's "criteria [and] methods" of funding public education yield racially differential results: Funding per child is less in the predominantly minority School District than it is per child in those otherwise similarly situated districts that educate predominantly white students. J.A. 37-39, ¶¶53, 55. This racial disparity per child exists for Philadelphia *and* as well for other predominantly minority districts.[3] The Complaint sets forth several sets of comparisons that demonstrate this adverse racial impact with respect to Commonwealth treasury revenues. In particular:

- Pennsylvania's funding system "gives school districts with high proportions of white students on average more Commonwealth treasury revenues than school districts with high proportions of non-white students, where the levels of student poverty are the same." J.A. 37-38, ¶53.

- In 1990-91, the School District "received 17.2% *less* [per child in Commonwealth treasury revenues] than the average of school districts with the same poverty rate." J.A. 38, ¶53 (emphasis added).

---

3. Based on Commonwealth data, the 12 school districts in Pennsylvania with 50% or more minority students as of all dates relevant to the Complaint are Philadelphia, Wilkinsburg Borough, Chester-Upland, Harrisburg, Duquesne, Farrell Area, William Penn, Lancaster, Aliquippa, York City, Reading, and Pittsburgh.

- "By 1995-96, Philadelphia received 33.1% *less* than expected statistically" per child on this same measure. J.A. 38, ¶53 (emphasis added).

"By 1995-96, 11 out of [the] 12 high-minority school districts . . . had *less* Commonwealth treasury revenues per student than school districts with higher white enrollments and the same level of poverty." J.A. 38, ¶54 (emphasis added).

- "On average, for 1995-96, for two school districts with the same level of poverty as measured by AFDC, the school district with higher non-white enrollment received $52.88 *less* [Commonwealth treasury revenues] per pupil for each increase of 1% in non-white enrollment." J.A. 39, ¶55.

The Complaint also alleges that racial disparities per child and adverse racial impact in Commonwealth treasury revenues are increasing over time:

- Between 1992 and 1996, the Commonwealth increased Commonwealth treasury revenues per pupil to districts that were 50% or more white by $498. The Commonwealth increased Commonwealth treasury revenues per pupil in Philadelphia by only $361, and to districts that had 75% or more minority student enrollments, including Philadelphia, by an average of only $384. J.A. 40, ¶58.

Plaintiffs pleaded racially discriminatory adverse impact with respect to total revenue as well. As with Commonwealth treasury revenues, the racial disparity in total revenues per pupil harms students in Philadelphia, the vast

harmed by the Commonwealth's racially discriminatory system of public school funding described in the Complaint because it "contribute[s] to declining urban population and erosion of the City's tax base." J.A. 42, ¶64. In sum, the Commonwealth's "racially discriminatory funding policies and practices impose excessive requirements on local funding, making it impossible for the City to afford the tax relief its citizens desperately need, and making it impossible for the City to provide the competitive tax rates and public education system which it needs to attract and retain residents and jobs in order to bolster and replenish its tax base and further revitalize the schools." J.A. 43, ¶66. *See* J.A. 25-26, 42-43, ¶¶25-26, 64-66 (stating the interests of the City plaintiffs and how they are harmed by defendants' conduct).

The Complaint names as defendants four Commonwealth officials with power and responsibility for public education, including recommendation and approval of appropriations, administration and supervision of the public schools, and receipt and distribution of federal and state funds. J.A. 26-28, ¶¶27-30. Those officials are: (1) Governor Thomas J. Ridge; (2) Chairperson of the State Board of Education Dr. James P. Gallagher; (3) Secretary of Education Dr. Eugene W. Hickok; and (4) Treasurer Barbara Hafer. Plaintiffs name each defendant in his or her "official and individual capacities." J.A. 26-28, ¶¶27-30.

D. The Causes of Action.

1. Count One. All plaintiffs join Count One, which alleges racial and national origin discrimination by disparate treatment that has an adverse racial impact, contrary to the DOE regulations implementing Title VI of the Civil Rights

Act of 1964. J.A. 43-48, ¶¶67-78. Count One sets forth the prohibition in Title VI against racial discrimination by entities that receive federal funds:

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

42 U.S.C. § 2000d. J.A. 43, ¶68. Title VI further requires:

> Each Federal department and agency which is empowered to extend Federal financial assistance to any program or activity... is authorized and directed to effectuate the provisions of section 2000d of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken.

42 U.S.C. §2000d-l. *See* J.A. 43, ¶69. DOE adopted such regulations, 34 C.F.R. part 100, which prohibit federal fund recipients, "on ground of race, color, or national origin," from:

> Provid[ing] any service, financial aid, or other benefit to an individual which is different, or is provided in a different manner, from that provided to others under the program;
>
> Subject[ing] an individual to segregation or separate treatment in any matter related to his receipt of any service, financial aid, or other benefit under the program[.]

34 C.F.R. § 100.3(b)(1) (ii), (iii). J.A. 44, ¶70.

The regulations further prohibit discriminatory adverse impact based on race or national origin:

APPENDIX B
CITED EXCERPTS FROM TRANSCRIPT OF JUNE 9, 1999 ORAL ARGUMENT

DAVID POWELL; SHELEAN PARKS; PATRICE EVERAGE; JULIA A. DAVIS; YVETTE BLAND; GERALDINE NEWTON; MARIA M. RIVERA; MARY E. MILLER; GREGORY LUZAK; CATHERINE LUZAK; FU-ZHEN XIE; THE BLACK CLERGY OF PHILADELPHIA AND VICINITY; PHILADELPHIA BRANCH NAACP; ASPIRA, INC. OF PENNSYLVANIA PARENTS UNION FOR PUBLIC SCHOOLS; CITIZENS COMMITTEE ON PUBLIC EDUCATION IN PHILADELPHIA; et al.

PHILADELPHIA FEDERATION OF TEACHERS LOCAL 3; TED KIRSCH, PRESIDENT, GUARDIAN AT LITEM,

Intervenors in D.C.

v.

THOMAS RIDGE, Governor of the Commonwealth of Pennsylvania; JAMES P. GALLAGHER, Chairperson Commonwealth of Pennsylvania State Board of Education; EUGENE W. HICKOK, Secretary of Education; BARBARA HAFER, Treasurer

MATTHEW J. RYAN; ROBERT C. JUBELIRER; JESS M. STAIRS; JAMES J. RHOADES,

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Appellants No. 98-2096

Page Two (Continued)

9:30 A.M.

THE ALBERT BRANSON MARIS COURTROOM
WEDNESDAY, JUNE 9, 1999
Coram: SLOVITER, MANSMANN, Circuit Judges
and WARD, District Judge
Nos. 98-2096/2157

DAVID POWELL; SHELEAN PARKS; PATRICE EVERAGE; JULIA A. DAVIS; YVETTE BLAND; GERALDINE NEWTON; MARIA M. RIVERA; MARY E. MILLER; GREGORY LUZAK; CATHERINE LUZAK; FU-ZHEN XIE; THE BLACK CLERGY OF PHILADELPHIA AND VICINITY; et al.

PHILADELPHIA FEDERATION OF TEACHERS LOCAL 3; TED KIRSCH, PRESIDENT, GUARDIAN AT LITEM,

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v.

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MATTHEW J. RYAN; ROBERT C. JUBELIRER; JESS M. STAIRS; JAMES J. RHOADES,

Intervenors in D.C.

June 9, 1999

Oral argument held before Judge Sloviter, Judge Mansmann, and Judge Ward, on the above date, transcribed from the taperecorded proceeding by Melissa M. Johnston, a Professional Reporter and a Commissioner of the Commonwealth of Pennsylvania.

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* * *

facts for Courts to develop what really amounts to intent and impact —

THE COURT: I just want to understand your argument. If I understand your argument on intent, it is that because the regulation speaks in terms of impact and the regulation is promulgated under Title VI therefore, if you show a violation of the regulation or a disparate impact under the regulation, you have met the intentional requirement of Title VI?

MS. BRANNAN: No, Your honor. We surely have met the requirement of the regulation.

THE COURT: But, of course, there are a lot of questions as to the enforceability, the viability, of the regulation. Go ahead.

MS. BRANNAN: Yes, Your Honor. On that question —

* * *